Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-933

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

ON APPEAL FROM THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

ON APPEAL FROM THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Tennessee Court of Appeals for the Middle Section, entered on April 27, 1979, affirming the decision of the Circuit Court of Macon County, Tennessee, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The rulings of the Supreme Court of Tennessee denying the appellant's Petition for a Writ of Certiorari and denying the appellant's Petition for a Rehearing of the Petition for a Writ of Certiorari are not reported. The

opinion of the Court of Appeals for the Middle Section is unreported. The findings of fact and conclusions of law of the Circuit Court of Macon County are unreported. Copies of these orders and opinions are attached hereto as Appendix I.

JURISDICTION

This action was brought by appellee pursuant to Tenn. Code Ann. §§36-801 *et seq.*, seeking a divorce, custody of the parties' child and, pursuant to Tenn. Code Ann. §36-825, a division of the jointly owned property.

On April 27, 1979, the Court of Appeals for the Middle Section entered its Opinion affirming the Trial Court's award to appellee of virtually all of the parties' jointly owned property. The Supreme Court of Tennessee denied appellant's Petition for a Writ of Certiorari in its Memorandum of July 30, 1979, and subsequently denied appellant's Petition to Rehear in its Memorandum of September 17, 1979.

Notice of Appeal was filed in the Tennessee Court of Appeals for the Middle Section on December 5, 1979.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §1257(2).

The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637, 48 L.Ed.2d 263, 96 S.Ct. 1800 (1976); *Dyke v. Taylor Implement Co.,* 391 U.S. 216, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928).

QUESTIONS PRESENTED

(1) When a husband's and a wife's contributions to jointly owned property are substantially equal, and upon a divorce the husband is awarded custody of the parties' thirteen year-old son, is the award to the husband, under the authority of Tenn. Code Ann. §36-825, of virtually all of the jointly owned property, without any compensation for the wife, so palpably unreasonable as to constitute a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

(2) Is Tenn. Code Ann. §36-825, which grants to the Court in divorce cases jurisdiction to divest property from one spouse and vest it in the other "as may be just and reasonable," a statute which is so vague as to be void under the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

Tenn. Code Ann. §36-825 appears in volume 6A of the 1977 Replacement of the Official Edition on page 435 and reads as follows:

> **Adjustment of interest in jointly owned property.**
>
> —In actions for divorce or separate support and maintenance, the Court having jurisdiction thereof may, in its discretion, adjust and adjudicate the respective rights and interests of the parties in all jointly owned property, so as to preserve for each or either party, that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case, regardless of how the Court may grant or refuse to grant relief in such case; and to

this end the Court shall be empowered to effectuate its decree by divesting and reinvesting title to such property and, where deemed necessary, to order a sale of such property and to order the proceeds divided between the parties. [Acts 1953, ch. 90, §1 (Williams, §8446); 1959, ch. 192, §1.]

Statement

Appellee and appellant were husband and wife for 24 years, during which time they acquired through their joint efforts agricultural property in Macon County, Tennessee, valued at nearly $500,000.00. There is no dispute that appellant's contributions to the purchase and maintenance of the property were substantial. Although her conduct during the marriage gave appellee sufficient ground for divorce under Tenn. Code Ann. §§36-801 *et seq.*, that conduct was invoked by the Trial Court as grounds for divesting her of all the jointly owned property in which she had an interest. Her interest arose out of the marriage, her toil, talent and money which she had contributed to acquire the property. While appellant was "awarded" the modest real estate business she had built up since 1973, its only appreciable asset was her personal services. Furthermore, the Trial Court specifically noted that it did not hold the real estate business to be jointly owned property, and was therefore, not subject to being divided by the Court under Tenn. Code Ann. §36-825.

In the Tennessee Court of Appeals for the Middle Section, appellant, in her first assignment of error, drew into question the constitutionality of the Trial Court's application of §36-825, Tennessee's property division statute, by citing the Court of Appeals to the case of *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), in

which there is set forth the bounds of an application of §36-825 which is valid under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, *sub silentio,* rejected appellant's argument that the statute had been applied in an unconstitutional fashion by stating in the third to the last paragraph of its Opinion that it found "no error in the division of property."

Although the Court of Appeals posited as other grounds for the Trial Court's application of the statute, the fact that appellee was awarded custody of the parties' thirteen year-old son and the concomitant burden of support, appellant respectfully submits that the value of the property bears no conceivable relation to the expense of supporting the child until he reaches majority and that §36-825 is still being applied in such a way as to deprive her of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Questions Are Substantial

Several states have enacted statutes providing that in divorce actions Courts shall have the power to divest property interests and reinvest them in the other spouse. In general and in Tennessee, the Courts are guided only by the requirement that property adjustments be just and reasonable. This Court has never ruled on the questions presented in this appeal, which arise out of the vagueness of Tenn. Code Ann. §36-825 and its arbitrary application by the Courts.

Statutes in some states enumerate the factors to be considered in dividing property rights, *e.g.,* Md. Cts. and Jud. Proc. Ann. §§3-6A-05(b)(1)-(9) and 3-6A-06(a)(1)-(4). In other states the Courts have announced that judicial guidelines of interpretation cure the vagueness of

the statutory language, *e.g., Painter v. Painter,* 65 N.J. 196, 213, 214, 320 A.2d 484, 493 (1974). But the problem of judicial abuse of fundamental rights persists in Tennessee, where neither statutory nor judicial standards are available. A lawyer can only guess where the Trial Court's whims may lead, and a litigant must proceed to trial unable to evaluate meaningfully the possibility that he or she will be stripped of hard earned property without compensation, in violation of the fundamental rights explained in *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 80, 81 L.Ed. 510, 57 S.Ct. 364 (1937).

When a statute creates a regime under which a person can become dispossessed and his or her property be given to another without compensation upon the bare conclusion by a Court that it is just and reasonable, and when that conclusion is drawn from circumstances the consideration of which has no reasonable connection to the deprivation effected, the regime created by that statute is palpably unfair, and this Honorable Court should welcome the opportunity to assure that it not prevail over the direct limitations erected by Federal Due Process. The abuse by the Tennessee courts of appellant's fundamental right to property, in addition to the likelihood that it can occur as a matter of course in Tennessee and in other states where similar statutes exist, indicate that the issues raised by appellant are so substantial as to require plenary consideration, with Briefs on the merits and oral arguments.

The Tennessee Court of Appeals for the Middle Section decided that the division of property was not erroneous. Although the record does not reflect that the constitutional question was raised in the Trial Court, that does not mean that it was not timely raised, because the Court of Appeals reviewed the case *de novo* and expressly considered and ruled on the question whether the property

division was proper. Since the Supreme Court denied the Appellant's Petition for a Writ of Certiorari, the judgment of the Court of Appeals is final under 28 U.S.C. §1257(2). *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637, 48 L.Ed.2d 263, 96 S.Ct. 1800 (1976).

By assigning as error the Trial Court's failure to rule in accord with *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), which outlines the extent to which Tenn. Code Ann. §36-825 is consistent with the Fourteenth Amendment, the record shows by fair intendment that appellant fairly and timely drew in question the constitutionality of the Trial Court's application of §36-825 as well as that statute's validity under the Fourteenth Amendment to the Constitution of the United States. According to *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928), the Fourteenth Amendment question was raised in such a manner as to require the exercise of appellate jurisdiction by this Court.

In affirming the Trial Court, the Court of Appeals advances alternative non-federal grounds relating to the manner in which the bill of exceptions was certified for review, but that Court specifically states that that technicality did not foreclose consideration of the propriety of the division of property. In light of their ruling that the division of property was correct, the Fourteenth Amendment question raised by the First Assignment of Error necessarily must have been decided, even though the Court failed expressly to rule on the question. The appeal is, therefore, properly before this Honorable Court. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928).

Because the Court of Appeals must have considered the property division in light of *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), and the constitu-

tional questions there discussed, the omission from Appellant's Assignments of Error of specific reference to the Fourteenth Amendment should not bar her appeal to this Court. *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968).

Furthermore, appellant's claim that Tenn. Code Ann. §36-825 is void for vagueness and her claim that it was applied in a palpably unreasonable fashion are both encompassed within the Fourteenth Amendment, so her failure to detail the constitutional objections should not take this case out of the appellate jurisdiction conferred by 28 U.S.C. §1257(2). While the record reflects that this appeal may not fall as squarely within that jurisdiction as may be preferred, the terms of §1257(2) are satisfied.

In light of the compelling nature of the case, and the necessity that this Court end the abuse of power occasioned by Tennessee's property division statute and others like it, the questions raised can be, and should be, considered and resolved.

Respectfully submitted,

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APPENDIX I

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE
NO. 13,218

JACK E. PORTER	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	MACON LAW
	)	
EVELYN PORTER	)	
	)	
Defendant-Appellant	)	

APPEALED FROM THE CIRCUIT COURT FOR MACON COUNTY, TENNESSEE, THE HONORABLE WILLARD HAGAN, JUDGE.

(Filed April 27, 1979)

FRANK D. FARRAR, Scottsville Road, Lafayette, Tennessee 37083; and SOLON FITZPATRICK, Carthage, Tennessee 37030, Attorneys for Plaintiff-Appellee.

JAMES W. CHAMBERLAIN, P. O. Box 98, Lafayette, Tennessee 37083, Attorney for Defendant-Appellant.

AFFIRMED and REMANDED.

Frank F. Drowota, III,
Judge.

Opinion

In this divorce case no appeal is taken from the findings of the trial judge that appellee, Jack Porter, is entitled to an absolute divorce. Appellant, Evelyn Porter, concedes that the testimony is clear and convincing that Jack Porter was entitled to an absolute divorce on the grounds of cruel and inhuman treatment. The sole questions on appeal deal with child custody and the division of property.

On July 19, 1978, a final decree was entered in the trial court awarding custody of the parties' thirteen year old son to Jack Porter and providing that Evelyn Porter was not required to contribute to the support of her son. The court awarded Evelyn Porter "her Porter Realty Company, all assets of same including any and all savings and/or checking accounts, her 1973 Chevrolet automobile and her personal belongings, and will assume the indebtedness thereon." The court then found that:

> All of the remaining joint property and assets of the Parties, including the real estate with the improvements thereon, the household furnishings, the cattle and farming equipment, and all other assets of every kind and character, are hereby divested out of the Defendant, Evelyn Porter, and vested in the Plaintiff, Jack Porter. The Plaintiff, Jack Porter, will assume all joint obligations, promissory notes and mortgages against the real estate and personal property and the Defendant, Evelyn Porter, will be held harmless in the payment thereof.

Evelyn Porter has appealed from the property division and child custody portions of the final divorce decree.

Appellee has filed a motion to strike the bill of exceptions because the exhibits introduced into evidence at

trial were neither filed and identified by the clerk nor authenticated by the trial judge. A bill of exceptions will be stricken if the record discloses that it does not contain all the evidence. *Johnson v. Johnson,* 185 Tenn. 400, 404, 206 S.W.2d 400 (1947). In *Cosmopolitan Life Ins. Co. v. Woodward,* 7 Tenn. App. 394, 402 (1928), this Court held that "in order to make exhibits a part of the bill of exceptions it must affirmatively appear that they were authenticated as such by the trial judge and filed by the clerk." Five documents marked exhibits have been forwarded to this Court. None of the documents were filed by the clerk nor authenticated by the trial judge.

One of the issues raised on appeal deals with the division of property. Unauthenticated Exhibit 4, a picture of appellant, throws no light on the issues raised on appeal and we would not strike the bill of exceptions if this were the only exhibit. *State v. Stewart,* 46 Tenn. App. 75, 88, 326 S.W.2d 688 (1959). However, in examining the other unauthenticated exhibits it appears that Exhibit 2, appellant's 1977 income tax return, and Exhibit 3, appellant's diary, are material to the issues raised on appeal. Exhibit 1 and Exhibit 5, although material, are sufficiently covered in the testimony of Evelyn Porter. Mrs. Porter was examined and testified with reference to many of the matters found in her diary, Exhibit 3. However, her diary covered a period from November 17, 1962, to April 5, 1977, and there is material evidence in the diary which does not appear in the authenticated bill of exceptions. The trial court obviously relied heavily on the diary. Appellee's motion to strike the bill of exceptions is well taken and shall be granted.

This appeal must stand on the technical record alone. Appellant's assignments of error go to the evidence intro-

duced at trial and in the absence of a bill of exceptions this Court must affirm the judgment of the trial court.

We hesitate to affirm upon a technicality, patricularly when the custody of a child is involved. We have therefore informally considered the bill of exceptions as filed and the unauthenticated exhibits.

Appellee relying upon language found in *Underwood v. Hill*, 10 Tenn. App. 608 (1959) contends that the findings of the trial judge are binding as a verdict of a jury, the material evidence ruling being applied. Therefore a threshold question which must be resolved is whether this Court as the reviewing court shall treat the decree of the trial judge with respect to the facts as the findings of a jury, or whether we review this cause *de novo* under T.C.A. §27-303.

This case began as a jury case. However, after the testimony of the defendant, Mrs. Porter, who was put on as a hostile witness by the plaintiff, defendant's counsel moved that the jury be discharged and dismissed because his client had admitted acts which constituted cruel and inhuman treatment. Plaintiff's counsel concurred in the motion. The court dismissed the jury with the stipulation and understanding by and between the parties and the court that the court would enter a judgment in favor of plaintiff, Jack Porter, against defendant, Evelyn Porter, due to her misconduct. The matter then proceeded to be heard before the trial judge without a jury.

Appellee cites the following language from *Underwood v. Hill*, 10 Tenn. App. 608, 618:

> "Where a jury is demanded by complainant and such is waived at the hearing and the cause heard by the Chancellor upon oral testimony, his finding is

> equivalent to the verdict of a jury." C. S. Boshears et al. v. J. I. Foster et al., 154 Tenn. 494 [1926], citing Choate v. Sewell, 142 Tenn. 487 [1919].

Cole v. Walker, 25 Tenn. App. 302, 158 S.W.2d 57 (1951), explains the apparent inconsistency between the pre-T.C.A. 27-303 cases of *Underwood v. Hill, supra, Boshears v. Foster, supra,* and *Choate v. Sewell, supra.* In *Cole v. Walker* the parties agreed in writing that "the case be tried by the Chancellor sitting as a jury." This Court then held that the effect of the agreement between the parties was to waive the actual presence of the jury and try the case before the Chancellor sitting as court and jury. This Court then stated "[i]f the parties had merely agreed to waive the jury and have an oral hearing before the chancellor, the case would have been a non-jury case tried irregularly and would have been reviewable in the mode provided in Code, section 10622 [now T.C.A. §27-303]." 25 Tenn. App. at 396.

In the case at bar the parties did not agree to have the case tried by the trial judge sitting as a jury. The parties merely agreed to waive the jury and have an oral hearing before the trial judge. Our review will therefore be *de novo* on the record of the trial court. However, we must presume that the trial court was correct unless the preponderance of the evidence is otherwise. T.C.A. §27-303.

We have carefully reviewed the evidence and we cannot say that it preponderates against the trial court's findings with reference to the division of property and child custody. The trial court made the following findings of fact with which we agree. That Mr. Porter had not done anything wrong. That he loved his wife and his family. That Mrs. Porter had "run openly, notoriously, adulterously with another man in various cities and

towns." That "she left home because of this other man that she went with and in front of her son who saw her on many occasions and it disturbed him." The court then held that "the child's custody would have to be committed to the father because I have to look to the general welfare."

With reference to the division of property the court found that "[t]he proof is that she is a diligent, hard worker and makes money in the real estate business and the business is making more than the farm and that she is able to make her own way."

Appellant here as in *Edwards v. Edwards*, 501 S.W.2d 283 (Tenn. App. 1973), argues she was improperly deprived of the custody of her child as punishment for her conduct. In *Edwards* the Court stated that:

> It is correct that the placement of custody should not be used solely to punish a parent for misconduct; however, misconduct does frequently reflect upon relative fitness or unfitness for custody; and, to this degree and for this purpose, misconduct of parents may properly be considered in the determination of custody.

501 S.W.2d 291.

In this case the trial judge was not in error in considering Mrs. Porter's misconduct. Appellee's thirteen year-old son can continue to be raised on the farm on which he grew up. We find no error in the trial court's award of custody.

We also find no error in the division of property. Appellant stated that she usually makes in the real estate business about the same as the farm makes. If we were to divide the farm and cattle we would be stripping Mr.

Porter of his sole means of support. He has farmed almost his entire life. With custody of his son he needs this means of support. Mrs. Porter has her own means of support.

As Judge Todd stated in *Edwards v. Edwards*, 501 S.W.2d at 292, "the complete divestiture of appellant's interest in joint property is based upon the placing of primary burden of support of the children upon the father by the order of custody, and that in any future proceedings between the parties in reference to child support, the division of property in said decree will be a proper matter for consideration.

The judgment of the trial judge is affirmed. The cause is remanded to preserve the continued supervisory jurisdiction of the trial court in respect to the welfare of the minor child. The costs of this appeal are adjudged against appellant.

Affirmed and remanded.

/s/ Frank F. Drowota, III, Judge

Shriver, P. J., concurs.
Todd, J., concurs.

APPENDIX II

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EVELYN PORTER	)	
	)	
PETITIONER	)	
	)	
vs.	)	MACON LAW
	)	
JACK E. PORTER	)	
	)	
RESPONDENT	)	

Memorandum on Petition for Writ of Certiorari

(Filed July 30, 1979)

Upon consideration of the petition for the writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Appeals reached the correct conclusion.

The writ is respectfully denied.

Per Curiam

APPENDIX III

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EVELYN PORTER	)	
	)	
PETITIONER	)	
	)	
vs.	)	MACON LAW
	)	
JACK E. PORTER	)	
	)	
RESPONDENT	)	

Memorandum on Petition to Rehear

(Filed ~~July 30~~ Sept 17, 1979)

The petition to rehear advances no arguments that were not considered by the Court in passing upon the petition for the writ of certiorari; accordingly, it is repectfully denied.

Per Curiam

APPENDIX IV

IN THE CIRCUIT COURT FOR MACON COUNTY, TENNESSEE

JACK E. PORTER	)	
	)	
PLAINTIFF-COUNTER-DEFENDANT,	)	
	)	
vs.	)	FILE NO. 1116
	)	
EVELYN PORTER,	)	
	)	
DEFENDANT-COUNTER-PLAINTIFF.	)	

Findings of Fact and Conclusions of Law

THE COURT: The court has listened very attentively to all the proof in this case that was introduced on yesterday and I find from that proof a diary of Ms. Porter that throughout the years she lived a reasonably happy life with her family until she went out on the public and started work, which is the case so many times we know of now. As long as she was at home and on the farm with her family, she . . . they got along real well. They worked. She worked and he worked. I don't accept the proposition that's inferred that he was a shiftless worker. I don't accept any inference there that he has any faults in this case whatsoever. He's clean. Most of the divorces here are six one and half a dozen the other in fault. That's not the case here. Mr. Porter hasn't done anything. He loved his wife over and beyond what most of us do and his family and

he didn't do anything to precipitate the termination of his marital relation that we're into today; but after his wife started to work she began to contact other folks and other fellows and she thought there was greener pasture somewhere and she became infatuated, involved in grossing enough land. Now she's not entitled to any credit, Mr. Chamberlain, in testifying the truth about what she did because there was no other way for her to testify. Her conduct with her paramour had become some opened [*sic*] and so notorious and so well known and so well documented that it has been [*sic*] quite a fallacious thing for her to come in here and say anything else, it might have been alright if she kept her mouth closed than to said anything, but she has run openingly, notoriously, adulterously with another man in various cities and towns, various trips, paying the bill herself she loved him so good on these trips. Now can a husband or a wife after twenty-three years accumulating go out and be guilty of that kind of conduct and then receive a stamped approval of the court by saying she ought to get her half, normally they get half when it's just a dispute, but she contends that she's justified because she didn't love her husband. Well if she didn't love her husband, wanted to separate from him and remain a lady, then she would have been entitled consideration; but that's not the case because she left home because of this other man that she went with and in front of her son who saw her on many occasions and it disturbed him; and in the course of a while, he finally got used to it and to the knowledge of adultery to her son, twelve year old boy. I can't . . . I can't in good conscience and integrity as Circuit Court look with any grace on that, look with any favor on it with any approval of it. I see a lot of justification for people separating and they do it all the time but not under these circumstances. It's

true these people worked hard and they've accumulated some property and some debts; but it's the opinion of this court and I so hold that Ms. Porter is not entitled to any alimony. I can't give her alimony. Under the law it provides that I can adjust property rights but I can't give her any alimony because I'm going to grant the plaintiff, the original plaintiff, a divorce; and under the circumstances I don't think I could give her custody of the child. I think the child's custody would have to be committed to the father because I have to look to the general welfare and she's living and has been in an illicit relationship which we all know about and that's not in the promotion of the child's interest and welfare that the child remain with her under those circumstances knowing what he knows. I grant the original complainant, Mr. Porter, a divorce, custody of the child and award Ms. Porter no property except her real estate business. If he has an interest in that, she's got that. She can have that and her car and any personal items that she might have in the house by way of furnishings. The proof is that she is a diligent, hard worker and makes money in the real estate business and the business is making more than the farm and that she is able to make her own way and that will be the judgment of the court.

APPENDIX V

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION
AT NASHVILLE

JACK E. PORTER	)	
	)	
v.	)	MACON LAW
	)	
EVELYN PORTER	)	

Notice of Appeal to the Supreme Court of the United States

(Filed December 5, 1979)

Notice is hereby given that Evelyn Porter, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Tennessee Court of Appeals for the Middle Section (Certiorari denied) affirming the ruling of the Trial Court, entered in this action on April 27, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Grant W. Smith
Grant W. Smith
Counsel for Appellant